No. 90-298

In The

Supreme Court of the United States

October Term, 1990

PRESBYTERY OF SEATTLE,

Petitioner,

v.

KING COUNTY,

Respondent.

On Petition For Writ Of Certiorari To
The Washington Supreme Court

MOTION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE, AMERICAN COLLEGE OF REAL ESTATE LAWYERS, IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The American College of Real Estate Lawyers respectfully moves for leave to file the attached brief as *Amicus Curiae* in support of the Petitioner. Consent to file the brief has been obtained from counsel for Petitioner. Consent from counsel for Respondent was requested but refused.

As more fully explained in the attached brief, the American College of Real Estate Lawyers believes that no court other than this Court can change the decision of this Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), even if that court is the court of last resort of any state.

The interest of the American College of Real Estate Lawyers lies in seeing that clear, fair, uniform, rational rules exist for property owners affected by governmental regulations involving constitutionally protected rights. The decision below would inject a radical new test as to when a regulatory taking entitling the property owner to compensation occurs.

Because of the hundreds of thousands of applications for the use of one's property that occur each year throughout the country that are constrained by governmental regulations, it is imperative that the direction given by *First English* not be permitted to be undermined by the decision of any state or lower federal court. For that reason, the American College of Real Estate Lawyers believes that this Court's review of the decision below is

essential and submits the attached brief in support of the Petitioner.

Respectfully submitted,

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BRIEF AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The American College of Real Estate Lawyers is a non-profit corporation organized for the purpose of gathering together lawyers distinguished for their expertise and high standards of professional and ethical conduct in the practice of real estate law, in order, *inter alia*, to improve and reform real estate law and practice and to speak upon matters of interest and importance to real estate law and practice. The College has over 700 members from every state and the District of Columbia. They represent owners, borrowers, lenders, purchasers, sellers, developers, in short, those having reasonable investment-backed expectations to use real property within constitutional bounds. College members are required to have concentrated their practice in real estate law for a period of not less than ten years. Additional requirements established by the Board of Governors include a demonstrated willingness to devote time to improving real property law, by writing, teaching or participating in organized bar projects.

The College is interested in this case because it substantially impacts private property rights affected by government land use regulations. The decision below establishes a "threshold inquiry" that eliminates most takings claims and converts those claims into substantive due process challenges, thus circumventing the rights secured by the Court in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987). The Washington Supreme Court effectively again relegates relief from excessive regulations to mere invalidation of the offending measure.

Because of the profound constitutional issue involved, as well as the important practical ramifications for those persons specially concerned with landowners being entitled to just compensation when land use regulations deprive them of the economically viable use of their land and where invalidation of the regulation cannot be the exclusive remedy, the College supports Petitioner in its Petition for Writ of Certiorari to the Washington Supreme Court.

SUMMARY OF ARGUMENT

The Washington Supreme Court in the case at bench ignored established precedent of this Court when it formulated a new standard for determining when regulation of property effects a taking requiring just compensation. That court held that a taking occurs only when the government regulation enhances a publicly owned right in property. This narrowly drawn definition of a taking has no basis in the decisions of this Court or any other court. The Washington Supreme Court expressly stated that it is only under those limited circumstances that a property owner would be entitled to compensation. Despite the fact that this Court in *First English* expressly held that the Fifth Amendment requires that regulatory takings be compensated, the Washington Supreme Court effectively held that a regulatory taking (as that term is defined by this Court and every other federal and state court) is a violation of substantive due process that can only be remedied by invalidation of the regulation. If this Court allows that decision to stand, without granting the Petition for Writ of Certiorari and overturning that decision,

such may, and probably will, be perceived as tacit approval of the Washington Supreme Court's analysis.

The Washington Supreme Court also incorrectly identified the relevant parcel for takings purposes by looking at the entire 4.5 acres owned by the Presbytery, rather than only that segment of the property that is subject to regulation. The Washington Supreme Court's holding that the parcel must be viewed in its entirety is in direct conflict with decisions of this Court, federal courts, and state courts. The issue of the relevant parcel for takings purposes is an issue that requires resolution by this Court.

ARGUMENT

I. THE WASHINGTON SUPREME COURT HAS APPLIED A STANDARD FOR IDENTIFYING AND COMPENSATING REGULATORY TAKINGS THAT DIRECTLY CONFLICTS WITH ESTABLISHED CASE LAW, INCLUDING DECISIONS OF THIS COURT, LOWER FEDERAL COURTS, AND STATE COURTS.

A. The Washington Supreme Court has created a definition of regulatory taking which conflicts with this Court's decisions and the decisions of all other state and lower courts.

In *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), this Court held that a regulation as applied to a particular property may effect a taking if it does not substantially advance legitimate state interests (citing *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928)), *or* if it "denies an owner economically viable use of his land" (citing *Penn Central*

Transp. Co. v. New York City, 438 U.S. 104, 138, n. 36 (1978)).[1] This simple definition of a Fifth Amendment regulatory taking includes within it both regulations which strip property of value and regulations which fail a substantive due process test by not substantially advancing legitimate state interests. This simple, all-inclusive definition has repeatedly been used by this Court. *See Nollan v. California Coastal Commn.*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 (1987); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981).

Whether the application of a regulation results in a taking is a highly *ad hoc* undertaking and not subject to analysis by a set formula. *Penn Central*, 438 U.S. at 124. It is "a question of degree – and therefore cannot be disposed of by general propositions." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

Equally clear, this Court has never defined a taking based on whether a benefit accrued to the government. To the contrary, as this Court long ago held: " . . . The

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[1] Many federal circuit courts have expressly followed the *Agins* approach, demonstrating the continuing efficacy of this Court's *Agins* description of a taking: *Lake Nacimiento Ranch Company v. County of San Luis Obispo*, 841 F.2d 872, 877 (9th Cir. 1987) (as-applied taking claim dismissed on ripeness grounds, facial claim analyzed under *Agins); Sederquist v. City of Tiburon*, 765 F.2d 756, 761 (9th Cir. 1984); *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483, 1486 (11th Cir. 1988); *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070, 1080 (5th Cir. 1989); *Georgia Outdoor Advertising v. City of Waynesville*, 900 F.2d 783, 787 (4th Cir. 1990).

question is, What has the owner lost? not, What has the taker gained?" *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910).

Nevertheless, the Washington Supreme Court in the case at bench[2] created a new definition of a regulatory taking which conflicts with this Court's decisions and the decisions of all other state and lower federal courts by announcing a wholly different test: a taking occurs *only* if the regulation " . . . actually enhances a publicly owned right in property." Pet.App. A-9. Were Washington's new and aberrant test to stand, virtually no regulatory infringement upon the rights of property owners would be a taking. Under the new Washington test, if "all" the government is doing is preventing harm (rather than enhancing its rights in specific property already owned by the government), then no taking would occur.

B. The Washington Supreme Court has restricted the ability of a property owner to recover just compensation to such an extent that it has undone this Court's Constitutionally mandated *First English* decision.

The United States Constitution, expressly and as interpreted by this Court, provides the remedy of compensation for regulatory takings. Prior to this Court's opinion in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), there

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[2] References to *Presbytery of Seattle v. King County* will be to the version printed in Appendix "A" of Petitioner's Petition for Writ of Certiorari in this Court and will be denominated as follows: Pet.App. A-#.

was confusion as to whether the Fifth Amendment admonition – "nor shall property be taken without just compensation" – applied to takings of property that resulted from regulation of property. Four times prior to *First English*, this Court faced the issue of compensation of regulatory takings and, in each case, did not reach the issue. *MacDonald, Sommer, & Frates v. Yolo County*, 478 U.S. 1035 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank*, 477 U.S. 340 (1986); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins*. In *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 636 (1981) (Brennan, J., dissenting) Justice Brennan, in dissent, formulated the standard that was eventually adopted by this Court in *First English*. In *First English*, this Court ended the confusion when it held that the standard adopted by the California Supreme Court, that regulatory takings could only be remedied by invalidation and not by compensation, violated the Fifth Amendment.

Earlier this year, in *Preseault v. I.C.C.*, 494 U.S. ___, 108 L.Ed.2d 1, 110 S. Ct. ___ (1990), this Court confirmed its *First English* conclusion that the just compensation remedy is not only required by the Constitution, but also that it must be first availed before any challenge may be made that the regulation is otherwise unconstitutional. The decision below virtually repeals the compensatory remedy which this Court concluded was "necessarily implicate[d]" by the Fifth Amendment in *First English*.

After decades of uncertainty about whether a regulation which goes too far requires compensation, this Court clearly settled the issue in *First English*. In the case at

bench, the Washington Supreme Court adopted a standard whose effect is the same as that of the California standard expressly rejected by this Court. The Washington Supreme Court, seemingly defiantly, effectively held that compensation is to be denied under almost every imaginable scenario where governmental regulation impacts the use of property to the point that the owner is entitled under *First English* to just compensation for the deprivation, albeit temporary. In the words of the Washington Supreme Court:

> If the regulation is not aimed at the legitimate public purpose, or uses a means which does not tend to achieve it, or if it unduly oppresses the landowner, then the ordinance will be struck down as violative of due process and the remedy is invalidation of the regulation.

Pet.App. A-12.

Subparagraph (c) of Rule 10 of the Rules of this Court could not have envisioned a more obvious conflict between applicable decisions of this Court and the decision of the Washington Supreme Court herein sought to be reviewed.

As if the question of the constitutionally required remedy were still an open question and *First English* did not exist, the Washington Supreme Court speculates: "Invalidation of the ordinance (instead of compensation) also avoids intimidating the legislative body. . . . " Pet.App. A-12. In *First English*, this Court rejected such a rationale for refusing compensation:

> We, of course, are not unmindful of these considerations, but they must be evaluated in

> the light of the command of the Just Compensation Clause of the Fifth Amendment.

482 U.S. at 317.

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional rights; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them.

482 U.S. at 321.

This Court's review is absolutely essential to avoid the judicial chaos, both inherent and predictable, if the Washington Supreme Court's radically different test is allowed to stand. Surely, Justice Stevens had a different conflagration in mind, when, in dissent in *First English*, he opined that the majority's decision was a "loose cannon" that would ignite a "litigation explosion." The Washington Supreme Court's decision below will, if not overturned, create such an explosion, rather than the settled framework for analysis left in the wake of *First English*. Washington has announced no mere "nuisance exception" to the general rule that just compensation is required when the government regulates the value out of private property. "The nuisance exception . . . is not coterminous with the police power itself." *Penn Central*, 438 U.S. at 145. The Fifth Amendment "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of

otherwise proper interference amounting to a taking." *First English*, 482 U.S. at 315.

Even if the potential for confusion and wasteful litigation as a result of the decision below were not so obvious for the country as a whole, at least the citizens of Washington are entitled to the benefit of this Court's decisions protecting their constitutional rights. They are not under a separate umbrella devoid of either federalism or the supremacy clause.

If the decision below is allowed to stand, other state and federal courts would be pressed to adopt its rationale and many courts may do so, notwithstanding *First English*, thus creating results for property owners throughout the nation inconsistent with the mandate of *First English*. Rightly or wrongly, they would view a denial of certiorari as tacit approval by the court, or at least a conclusion by this Court that the decision below can co-exist with *First English*.

II. DEFINING THE RELEVANT PARCEL FOR TAKING PURPOSES IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

In the case at bench, the Washington Supreme Court held that the relevant unit of property for takings purposes was a "parcel of regulated property." 787 P.2d at 914. The Court stated that the takings analysis must view the parcel in its "entirety." *Id.* at 915. The Washington court views the entire parcel as the 4.5 acres that are under the single ownership of the Presbytery. The Court ignores the "ad hoc factual" nature of takings analysis,

which is reflected in the decisions of this Court, lower federal courts, and state courts.

The Washington court relies heavily on this Court's decisions in *Keystone* and *Penn Central*. Admittedly, those decisions expressed a takings standard that required consideration of the parcel as a whole; however, other decisions of this Court have held that the denial of just one property right may constitute a taking. In *Hodel v. Irving*, 481 U.S. 704, 718 (1987), this Court held that the denial of a single strand of property interest (deprivation of right to devise property) was a taking. Similarly, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), this Court held that the denial of the right to exclude was sufficient to constitute a taking. What these cases demonstrate is that different circumstances require different analyses.

The wetlands regulations at issue in this case forbid the development of specifically designated property. The complete prohibition of development of specific property, despite the size of that property, is a taking. This Court's decisions in *Penn Central* and *Keystone* support a finding of a taking in the case at bench. In *Penn Central*, this Court defined the entire parcel as the entire area of regulated property, which was the city tax block designated as a historic site (the Grand Central Terminal). In *Keystone*, this Court found no taking by comparing the amount of coal that could not be used with any "reasonable unit" of the plaintiffs' coal mining operations. Again, it was the coal mining operations generally that were being regulated. In this case, if we compare the amount taken with the area regulated, we find that no development is permitted on the entire area being regulated – the wetlands.

The decision below conflicts with decisions of other state and federal courts. Clearly, if the frontage of a large tract, or corner of a large tract, or that portion of a tract which made the remainder valuable were over-regulated so as to result in a taking requiring just compensation, the Washington Supreme Court's newly adopted *entirety* theory compels a holding that neither a taking nor deprivation of the portion regulated occurred, nor that any compensation would be available. By contrast, other courts have held that regulatory stultification of part of a larger tract of land can be a taking which requires compensation. *Fifth Avenue Corp. v. Washington County,* 282 Ore. 591, 581 P.2d 50 (Ore. 1978) (part of property zoned for transit station and greenbelt); *Twain Harte Assoc., Ltd. v. County of Tuolumne,* 217 Cal.App. 3d 71 (1990) (part of property zoned open space); *American Savings & Loan Assn. v. County of Marin,* 653 F.2d 364 (9th Cir. 1981) (part of property zoned for density too low to permit economic use).

The Washington Supreme Court itself has addressed this issue. In *Allingham v. Seattle,* 109 Wash. 2d 947, 749 P.2d 160 (1988), the applicable portion of which it expressly overrules in this case, the Washington Supreme Court found a taking where a Seattle greenbelt ordinance affected only a portion of the owner's parcel. The Washington court in *Allingham* expressly rejected the argument that because the regulation only affected a portion of the owner's property it was not a taking:

> According to this argument, the City should be allowed to regulate away all rights of ownership to a portion of a person's property so long as some part of the property remains usable. We find this argument unpersuasive. If the City

> were to take a portion of certain properties for the purpose of building a road, clearly we would hold that the city must pay for the land so taken. Likewise where, as here, the City takes a portion of certain properties for the purpose of preserving greenbelts, the City must pay for the land taken. To permit the City to accomplish the same purpose under the guise of a zoning regulation would be inequitable and would constitute an unconstitutional taking of private property without just compensation.

109 Wash. 2d 947, 749 P.2d at 163.

The Washington court's analogy in *Allingham* to physical invasion is correct. The regulation at issue here deprives the property owner of the use of its property in the same manner that a physical invasion of its property would deprive it of that use. This Court has held that a physical invasion, no matter the size, is a taking. *See Loretta v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419, 435-36 (1982).

The Washington Supreme Court's new *entirety* thesis is inconsistent with either logic or prior decisions of this Court. Simply stated, if Washington had to condemn by eminent domain the portion of the Presbytery's property it would be required to pay just compensation for the property taken.

Accordingly, the College respectfully suggests to the Court that the relevant parcel for takings purposes is, indeed, a very important question of federal law that should be settled by the Court so that the post-*First English* and *Nollan* cases that are being determined in both the state and lower federal courts have guidance so

as to provide a consistently fair doctrine in keeping with prior precedent of this Court.

CONCLUSION

For the foregoing reasons, the American College of Real Estate Lawyers respectfully urges this Court to grant the Petition for Writ of Certiorari and reverse the decision of the Washington Supreme Court.

DATED: September 17, 1990

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